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The Spirit and Manners of the Present Time, Sept. 1800

by Wilhelm Schlegel

Jena

The LEARNED READING Of Sir Francis Bacon,

One of her Majesties learned Counsell at Law, upon the Statute of USES:

Being his double Reading to the Honourable Society of GRAYES Inne.

Published for the Common good.

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The Learned Reading of Sir FRANCIS BACON, upon the Statute of Vſes.

I Have choſen to Read upon the Law of Vſes made 27. *Hen.*8 a Law whereupon the Inheritances of this Realme are toſſed at this day like a Ship upon the Sea, in ſuch ſort that it is hard to ſay which Barke will ſinke, and which will get to the Haven, that is to ſay, what aſſurances will ſtand good, and what will not; whether is this any lack or default, in the Pilots their grave and learned Judges: but the Tydes and Currents of received errours, and unwarranted and abuſive experience, have bin ſo ſtrong, as they were not able to keepe a right courſe according to the Law, ſo as this Statute is in great part, as a Law made in the Parliament,

held 35. *Reginæ*, for in 37. *Reginæ*, by the notable judgement upon solemne Arguments, of all the Judges assembled in the Exchequer Chamber, in the famous case betweene *Dillon* and *Frayne*, concerning an assurance by *Chudley*: this Law began to be reduced to a true and sound Exposition, and the false and perverted Exposition, which had continued for so many yeares, but never countenanced by any rule or authority of weight, but onely intertained in a popular conceipt, & in practice at adventure grew to be controle, since which time (as it commeth to passe alwaies upon the first reforming of inveterate errours) many doubts, and perplexed Questions have risen, which are not yet resolved nor the Law thereupon setled: The consideration whereof moved me to take the occasion of performing this particular duty to the House, to see if I could by my travell, bring to a more generall good of the Common wealth.

Herein though I could not be ignorant of the difficulty of matter, which he that taketh in hand shall soone find, or much lesse of my owne unableness, which I had continuall sence and feeling of; yet because I had more meanes of absolution then the younger sort, and more leasure then the greater sort, I did thinke it not impossible to worke some profitable effect, the rather because where an inferior wit is bent, and conversant upon one Subject, he shall many times with patience and meditation dissolve, and undoe many of the knots which a greater wit, distracted with many matters would rather cut in two then unknit at the least if my intention or judgement be too barren, or too weake; yet by the benefit of other Arts, I did hope to dispose or digest, the authorities or Opinions which are in Cases of use in such order and method, as they should take light one from another, though they tooke no light from me and like to the matter of my Reading shall my manner be, for my meaning is to revive and recontinue the antient forme of Reading, which you may see in Mr. *Fromickes*, upon the Prerogative, and all other Readings of ancient time, being of lesse ostentation and more fruite, then the manner lately accustomed, for the use then was substantially

to

to expound the Statutes, by grounds and diversities, as you shall find the Readings still to run upon case of the like Law, and contrary Law, whereof the one includes the learning of a difference, and not to stir concise and subtile doubts, or to contrive tedious and intricate Cases, whereof all saving one are buried, and the greater part of that one case which is taken, is commonly nothing to the matter in hand, but my labour shall be in the antient course, to open the Law upon doubts, and not doubts upon the Law.

Expositio Statuti.

THe Exposition of this Statute consists upon the matter without the Statutes, upon the matter within the Statute.

Three things concerning these Statutes, and all other Statutes which are helpes and inducements to the right understanding of my Statute, and yet are no part of the Statute it selfe.

The consideration of the Statute at the Common Law. 1.

The consideration of the mischiefe which the Statute intendeth to redresse, as any other mischiefe, which an Expositor of the Statute this way or that way may breed. 2.

Certaine Maximes of the common Ley, touching Expositions of Statutes: having therefore framed sixe divisions according to the number of Readings upon the Statute it selfe, I have likewise divided the matter without the Statute into sixe Introductions or Discourses, so that for every dayes Reading I have made triple proposition. 3.

1. *Vn Preface, or Introduction.*
2. *Vn Division upon the Law it selfe,*
3. *A few brief Cases, for Exercise and Argument.*

The last of which I would have forborne, and according to the

the antient manner, You ſhould have taken ſome of my points upon my Diviſions, one, two, or more as you ſhould have thought good, ſave that I had this regard, that the younger ſort of the Barre were not ſo converſant, upon matters upon the Statutes, and for that Caſe I have interlaced ſome matters at the Common Law that are more familiar within the books,

1. The firſt matter I will Diſcourſe unto you, is the nature and definition of an uſe, and his Inceſſion and Progreſſion before the Statute.

2. The Second Diſcourſe ſhall be of the ſecond ſpring of this Tree of Uſes ſince the Statute.

3. The Third Diſcourſe ſhall be of the Eſtate of the aſſurance of this Realme at this day upon Uſes, and what kind of them is convenient and reaſonable, and not fit to be touched, as far as ſence of Law and naturall conſtruction of the Statute will give leave, and what kind of them is convenient and meete to bee ſuppreſſed.

4. The Fourth Diſcourſe ſhall be of certaine Rules and Expoſitions of Lawes applyed to this preſent purpoſe.

5. The Fifth Diſcourſe ſhall bee of the beſt courſe to remedy the ſame inconveniences now a foot, by conſtruction of the Statute, withoutoffering violence to the letter or ſence.

6. The Sixt and laſt Diſcourſe ſhall be of the beſt courſe to remedy the ſame inconveniences, and to declare the Law by Act of Parliament, which laſt I thinke good to reſerve and not to publiſh.

The nature of a uſe is beſt diſcerned by conſidering what it is not, and then what it is, for it is the nature of all humane Science, and knowledge to proceed moſt ſafely by Negative and excluſive.

Firſt, uſe is no right, title, or intereſt in Law, and therefore Maſter *Attorney* who read upon this Statute ſaid well, that there are but two rights.

Ius in Re.
Ius ad Rem.

The one is an Eſtate which is *Ius in Re*, the other a demand

mand which is *Ius ad Rem*, but a uſe is neither, ſo that in 24. *H.* 8. it is ſaid that the ſaving of the Statute of *I. R.* 3. which ſaveth any right or intereſt of Intayle, muſt be underſtood of Intayles of the poſſeſſion, and not of the part of the uſe, becauſe a uſe is no right nor intereſt; ſo againe, you ſee that *Littletons* conceipt, that an uſe ſhould amount to a Tenancy at will, whereupon a releaſe might well inure, becauſe of pravity is controled by 4. *Et* 5. *H.* 7. and diverſe other bookes, which ſaid that *Ceſty que uſe* is puniſhable in an Action of Treſpaſſe towards the Feoffees onely 5. *H.* 5. ſeemeth to be at ſome diſcord with other Bookes where it is admitted for Law, that if there be *Ceſty que uſe* of an Advowſon, and hee bee out-lawed in a perſonall Action, the King ſhould have the preſentment, which Caſe Maſter *Evans* in the argument of *Chudleyes* Caſe did ſeeme to reconcile this where *Ceſty que uſe* being utlaird, had preſented in his owne name, there the King ſhould remove his incumbent, and no ſuch thing can be collected upon that Booke, and therefore I conceive the errour grew upon this, that becauſe it was generally thought, that a uſe was but a penancy of profits, and then againe becauſe the Law is that upon Utlayers, upon perſonall Actions, the King ſhall have the penancy of profits, they tooke that to bee one, and the ſelfe ſame thing which *Ceſty que uſe* had, and which the King was intituled unto which was not ſo, for the King had remedy in Law for his penancy of profits, but *Ceſty que uſe* had none, the Bookes goe further and ſay, that a uſe is nothing, as in 2. *H.* 7. *Dett fuit Port*, and counted *Sur leas* for yeares rent &c. the Defendant pleaded in Barre, that the Plaintiffe *Nihil habuit tempore diviſionis*, the Plaintiffe made a ſpeciall replication, and ſhewed that he had no uſe and iſſue joyned upon that, wherefore it appeareth, that if hee had taken iſſue upon the defendants Plea, it ſhould have bin found againſt him: So againe in 4. *Reginæ*, in the Caſe of the Lord Sands, the truth of the caſe was a Fine leavied by *Ceſty que uſe* before the Statute, and this comming in queſtion ſince the Statute upon an averment by the Plaintiffes *Quod partes finis nihil habuerint*,

it is ſaid that the Defendant may ſhew the ſpeciall matter of the uſe, and it ſhall be no departure from the firſt pleading of the ſame, and it is ſaid further that the averment given in 4. *H.* 7. *Quod partes finis nihil habuerint, nec in poſſeſſione, nec in uſu* went out upon this Statute of 27. *Hen.* 8. and was no more now to be accepted; but yet it appeares, that if iſſue had bin taken upon the generall averment, without the ſpeciall matter ſhewed, it ſhould have bin found, for him that tooke the averment becauſe a uſe is nothing, but theſe bookes are not to be taken generally or groſly, for wee ſee in the ſame bookes, when an uſe is ſpecially alleadged, the Law taketh knowledge of it, but the ſence of it is, that uſe is nothing for which remedy is given by the courſe of the Common Law, ſo as the Law knoweth it, but protects it not; and therefore when the queſtion commeth whether it hath any being in Nature and Conſcience the Law accepteth of it, and therefore *Littletons* Caſe is good Law, that hee which hath but forty ſhillings Free-hold in uſe, ſhall be ſworne in an inqueſt, for it is ruled *Secundum dominium laterale*, and not *Secundum dominium legitimum, nam natura dominus eſt quia fructum ex re percipit.* And ſome doubt upon Subſidies and Taxes *Ceſty que uſe* ſhould be valued as an owner: So likewiſe if *Ceſty que uſe* had reſolved his uſe unto the Feoffee for ſixe pound, or contracted with a ſtranger for the like ſome, there is no doubt but it is a good conſtruction, whereon to ground an Action upon the Caſe, for mony for releaſe of a Suite in the *Chancery* is a good *quid pro quo*, therefore to conclude, though a uſe be nothing in Law to yeeld remedy by courſe of Law, yet it is ſomewhat in reputation of Law and Conſcience, for that may be ſomewhat in conſcience which is nothing in Law, like as that may be ſomething in Law which is nothing in Conſcience; as if the Feoffees had made a feoffment over in Fee, *Bona fide*, upon good conſideration, and upon a *Subpœna* brought againſt them, hee pleaded this matter in *Chancery*, this had beene nothing in Conſcience, not as to diſcharge them of damages.

A ſecond negative fit to be underſtood is, that a uſe is no

Covin,

Covin, nor it is no colluſion, as the word is now uſed, for it is to be noted, that where a man doth remove the ſtate and poſſeſſion of Land, or goods out of himſelfe unto another upon truſt, it is either a ſpeciall truſt, or a generall truſt.

The ſpeciall truſt is either { *Lawfull,* / *Or* / *Unlawfull.* }

The ſpeciall truſt Unlawfull, is according to the Caſe provided, for by ancient Statutes of the profits, as where it is to defraud Creditors, or to get men to maintaine ſuites, or to deſeate the tenancy to the precipe, or the Statute of *Mortmaine*, or the Lords of their wardſhips or the like, and thoſe are termed Frauds, Covins, or Colluſions.

The ſpeciall truſt Lawfull is, as when I infeoffee ſome of my friends, becauſe I am to goe beyond the Seas, or becauſe I would free the Land from ſome ſeverall Statute, or Bond which I am to enter, into or upon intent to be infeoff'd, or intent to vouched, and ſo to ſuffer a common Recovery, or upon intent that the Feoffees ſhall infeoffee over a Stranger, and infinite the like intents and purpoſes, which fall out in mens dealings and occaſions, and this wee call Confidence, and the Bookes doe call them intents, but where the truſt is not ſpeciall, nor tranſitory, but generall and permanent, there it is a uſe; and therefore theſe three are to be diſtinguiſhed, and not confounded by Covin Confidence, uſe.

So as now we are come by Negatives to the Affirmative, what a uſe is agreeable to the definition in *Plowden*, 352. *De Lamers* Caſe, where it is ſaid:

Vſe is a truſt repoſed by any perſon in the Terre-tenant, that he may ſuffer him to take the profits, and hee that will performe his intent. But it is a ſhorter Speech to ſay, that

Vſus eſt dominium fiduciarium:
Vſe is an owners life in truſt:

So that *Vſus eſt ſtatus, ſive poſſeſſio totius, differ. ſecun-*

dum rationem fori quàm secundum naturam rei, for that one of them is in Court of Law, the other in court of Conscience, and for a trust which is the way to an use, it is exceeding well defined by a Civilian of great understanding:

Fides est obligatio Conscientiæ unius ad intentionem alterius.

And they have a good division likewise of Rights.

Ius precarium.
Ius fiduciarium.
Ius legitimum.

A right in courtesie, for the which there is no remedy at all.
1. A right in trust for which there is a remedy, onely but in
2. Conscience.
A right in Law.
3. So much of the nature and definition of an use.

It followeth to consider the parts and properties of an use wherein by the consent of all Bookes, and it was distinctly delivered by Justice *Walmeley*, in 36. *Elizabeth*.

That a trust consisteth upon three parts.

The First, that the Feoffee will suffer the Feoffer to take the profits.

The Second, that the Feoffee upon request of the Feoffer, or notice of his Will, will execute the Estates to the Feoffer, or his Heires, or any other by his direction.

The Third, that if the Feoffee be disseised, and so the Feoffer disturbed, the Feoffee will re-enter, or bring an action to re-continue the possession, so that those three, pernancy of Profits, execution of Estates, and defence of the Land, are the three poynts of trust.

The properties of an use they are exceeding well set forth, by former Justice in the same Case, and they be three,

Uses (saith he) are created by Confidence.
1. Pressed by privity, which is nothing else but a continuance.
2.

Of

Of the Confidence without interruption and ordered and guided by Conſcience : either by the private Conſcience of the Feoffee ; Or the generall Conſcience of the Eſtate which is *Chancery*. 3.

The two former of which (becauſe they bee matters more throughly beaten, and wee ſhall have occaſion to handle them) we will not now debate upon.

But the third we will ſpeake ſomewhat of both, becauſe it is a key to open many of true reaſons, and termings of uſes, and becauſe it tendeth to decide out great and principall doubts at this day.

Cooke Soliciter entring into his Argument of *Chudleyes* Caſe, ſaid ſharply and fitly, I will put never a Caſe but ſhall be of an uſe, for a uſe in Law hath no fellow; meaning that the learning of uſes is not to bee matched with other Learnings : *Anderſon* chiefe Juſtice in the Argument of the ſame Caſe, did truely and profoundly controule the Vulgar opinion collected upon the fifth *E.* 4. that there might be *Poſſeſſio fratris* of a uſe, for he ſaid that it was no more but that the Chancelee would conſult with the Rules of Law, where the intention of the parties did not ſpecially appeare, and therefore the private conceipt which *Glanvile* Juſtice cited in the 42. *Reginæ* in the caſe of *Corbet*, in the Common Plea of one of *Lincolnes Inne*, whom he named not, but ſeemed to allow is not ſound, which was, that a uſe was but a limitation, and did enſue the nature of a poſſeſſion.

This very conceipt was ſet on foot in 27. *H.* 8. in the Lord *Darcies* Caſe, in which time they began to heave at uſes, for there after the Realme had many ages together put in ure the paſſage of uſes by Will, they began to argue that an uſe was not deviſeable, but that it did enſue the nature of the Land, and the ſame yeare after this Statute was made; ſo that this opinion ſeemeth ever to bee, and for ever to an Act of Parliament touching uſes ; and if it bee ſo meant, now meant I like it well : but in the meane time the Opinion it ſelfe is to be recited, and becauſe in the ſame Caſe of *Corbet* 3. reverent Judges of the Court of Common Pleas, did de-

liver and publiſh their Opinion, though not directly upon the point adjudged, yet *obiter* as one of the Reaſons of their judgement, that an uſe of Inheritance could not be limited to ceaſe, and againe, that the limitation of a new uſe could not be to a Stranger, ruling uſes meerely according to the ground of poſſeſſion, it is worth the labour to examine, that learning by 3. *Hen.* 7. You may collect that if the Feoffees had bin diſſeiſed by the Common Law, and an Anceſtor collaterall of *Ceſty que uſe* had releaſed unto the diſſeiſor, and his warranty had attached upon *Ceſty que uſe*, yet the Chancellour upon this matter ſhewed, would have not reſpect unto it, to compell the Feoffees to execute the Eſtate unto the diſſeiſor, for there the caſe being, that *Ceſty que uſe* Intayle, having made an aſſurance by fine and recovery, and by warranty which deſcended upon his iſſue, two of the Judges held that the uſe is not extinct, and *Bryan* and *Huſſey* that held the contrary ſaid, that the Common Law is altered by the new Statute, whereby they admit, that by the Common Law that warranty will not bind and extinct a right of a uſe, as it will doe a right of poſſeſſion, and the reaſon is, becauſe the Law of Collaterall garranty is a hard Law, and not to be conſidered in a Court of Conſcience, in 5. *Edw.* 4. It is ſaid that if *Ceſty que uſe* be attainted, *quære*, who ſhall have the Land, for the Lord ſhall not have the Land, ſo as there the uſe doth not imitate the poſſeſſion, and the reaſon is, becauſe the Lord hath a Tent is by Title, for that is nothing to the *Subpœna*, becauſe the Feoffees intent was never to advance the Lord, but onely his owne bloud, and therefore the *quære* of the Booke ariſeth what the truſt and confidence of the Feoffee did tye him to doe, as whether he ſhould not ſell the Land to the uſe of the Feoffees Will, or in pious uſes, ſo favourably they tooke the intent in thoſe dayes, as you find in 27. *H.* 6. that if a man had appointed his uſe to one for life, the remainder in Fee to another, and *Ceſty que uſe* for life had refuſed, becauſe the intent appeared not to advance the Heire at all, nor him in reverſion, preſently the Feoffee ſhould have the Eſtate for life of him that refuſed ſome waies to the behoofe of the Feoffer.

But to proceed in some better order towards the disproofe of this Opinion of limitation, there be foure points wherein we will examine the nature of uses.

The rayſing of them. 1.
The preſerving of them. 2.
The transferring of them. 3.
The extinguiſhing of them. 4.

In all theſe Foure, you ſhall ſee apparantly that uſes ſtand upon their owne reaſons, utterly differing from Caſes of poſſeſſion, I would have one Caſe ſhewed by men learned by the Law, where there is a deed, and yet there need a conſideration, as for paroll, the Law adjudgeth it too light to give a uſe without conſideration, but a deed ever in Law imports a conſideration, becauſe of the deliberation and Ceremony in the confeſſion of it, and therefore in 8. *Reginæ* it is ſolemnly agreed, that in the Queenes Caſe a falſe conſideration if it bee of Record, will hurt the Patent, but want of conſideration doth never hurt it, and yet they ſay that a Caſe is but a nimble and light thing, and now contrariwiſe it ſeemeth to bee weightier then any thing elſe, for you cannot weigh it up to raiſe it, neither by deed, nor deed inrolled without the weight of conſideration, but you ſhall never find a reaſon of this, to the Worlds end, but in the Law, but it is a reaſon of *Chancery*, and it is this:

That no Court of Conſcience will enforce *Omnium gratuitum*, though the intent appeare never ſo clearely where it is not executed, or ſufficiently paſſed by Law, but if money had beene paid, and ſo a perſon dampnified, or that it was for the eſtabliſhment of his Houſe, then it is a good matter in the *Chancery*: ſo againe I would ſee in the Lawes, a Caſe where a man ſhall take by a Conveyance, bee it by Deed, Livery, or Word that is not party to the grant, I doe not ſay that the delivery muſt be to him that takes by the Deed, for a Deed may be delivered to one man to the uſe of another;

neither

neither doe I say that he must be party to the delivery of the Deed, for he in the remainder may take though hee be not party, but he must be party to the words of the grant; here againe the Case of the use goeth single, and the reason is, because a conveyance in use is nothing but a publication of the trust, and therefore so as the party trusted bee declared, it is materiall to whom the publication bee so much for the raysing of uses.

There is no Case in the Common Law, wherein notice simply and nakedly is materiall to make a Covin, or *particeps Criminis*, and therefore if the Heire which is in by discent, infeoffee one which had notice of the disseisin, if he were not a *Disseisor de facto*, it is nothing: so in 33. *H.* 6. if a Feoffment be made upon collusion, and feoffee makes a feoffment over upon good consideration, the collusion is discharged, and it is not materiall if they had notice or no, so as it is put in 14. *H.* 8. if a sale be made in a Market over upon consideration, although it be to one that hath notice that they are stollen goods, yet the property of a Stranger is bound, though in the Booke before remembred 35. *Hen.* 6. some opinion to the contrary, which is clearely no Law, so in *E.* 3. if assets discend to the Heire, and hee alien it upon good consideration, although it be to one that had notice of the Debt, or of the Warranty it is good enough. So if a man enter of purpose into my Lands, to the end that a Stranger which hath right, should bring his *Præcipe* and evict the Land, I may enter notwithstanding any such recovery, but if hee enter having notice that the Stranger hath right, and the Stranger likewise having notice of his entry, yet if it were not upon Confederacy or collusion betweene them it is nothing, and the reason of these Cases is, because the Common Law looketh no further then to see whether the Act were meerely *Actus fictus in fraudem legis*, and whersoeverit findeth consideration given it dischargeth the covin.

But come now to the Case of use, and there it is otherwise, as it is in 14. *H.* 8. and 28. *H.* 8. and diverse other Bookes,

Bookes, which prove that if the Feoffee ſell the Land ſo for good conſideration to one that hath notice, the Purchaſer ſhall ſtand ſeized to the antient uſe, and the reaſon is becauſe the *Chancery* looketh further then the Common Law, to the corrupt Conſcience of him that will deale in the Land, knowing it in equity to bee anothers, and therefore if there were *Radix Amaritudinis*, the conſideration purgeth it not, but it is at the perill of him that giveth it, ſo that conſideration, or no conſideration is an iſſue at the Common Law, but notice on notice is an iſſue in the *Chancery*, and ſo much for the preſerving of uſes.

For the transferring of uſes there is no caſe in Law whereby an Action is transferred but the *Subpœna*, in caſe of uſe wasalwayes aſſigneable, nay further you find twice 27. *H.* 8. *Fol.* 10. *Pla.* 9. *Fo.*30. and *Pla.* 21. that a right of uſe may be transferred, for in the former caſe *Montague* maketh the objection and ſaith, that a right of uſe cannot be given by Fine, but to him that hath the Poſſeſſion, *Fitz. Herbert* anſwereth, Yes well enough; *quere* the reaſon ſaith the booke.

And in the latter Caſe where *Ceſty que uſe* was infeoffed by the Diſſeiſor of the Feoffee, and made a Feoffment over: *Engleſield* doubted whether the ſecond Feoffee ſhould have the uſe, *Fitz. Herbert* ſaid, I marvell you will make a doubt of it, for there is no doubt but the uſe paſſeth by the Feoffment to the Stranger, and therefore this Queſtion needeth not to have beene made; ſo the great difficulty in 10. *Reginæ, Declamers* Caſe, where the caſe was in effect Tenant in tayle of an uſe, the remainder in Fee, Tenant in tayle made a Feoffment in Fee, Tenant, by the Statute of *I. R.* 3. and the Feoffee infeoffed him in the remainder of the uſe, who made it over, and there queſtion being made whether the ſecond Feoffee ſhould have the uſe in remainder, it is ſaid that the ſecond Feoffee muſt needs have the beſt

right in Conſcience, becauſe the firſt Feoffee claimed nothing but in truſt, and the reſt *que uſe* cannot claime it againſt his ſale, but the reaſon is apparant (as was touched before) that a uſe in *Eſſe* was but a thing in action, or in ſuite to be brought in Court of Conſcience, and where the *Subpœna* was to be brought againſt the Feoffee out of poſſeſſion to recontinue the Eſtate, alwayes the *Subpœna* might bee transferred, for ſtill the Action at the Common Law was not ſtir'd, but remained in the Feoffee, and ſo no miſchiefe of maintenance or transferring rights.

And if a uſe being but a right may bee aſſigned, and paſs'd over to a Stranger, a *multo fortiori*, it may bee limited to a Stranger upon the privity of the firſt conveyance, as ſhall bee handled in another place, and as *Glanvile* Juſtice ſaid, hee could never find by any booke, or evidence of antiquity, a continge uſe limited over to a Stranger, I anſwer, Firſt it is no marvell that you find no Caſe before *E.* 4. time of contingent uſes, where there bee not fixe of uſes in all, and the reaſon I doubt was, men did chooſe well whom they truſted, and truſt was well obſerved, and at this day in *Ireland*, where uſes be in practiſe, Caſes of uſes come ſeldome in queſtion, except it bee ſometimes upon the alienations of Tenants in tayle by Fine, that the Feoffees will not bee brought to execute Eſtates, to the diſ-inheritance of antient bloud, but for experience, and the conveyance there was nothing more uſuall in *Obyſts*, then to will the uſe of the Land to certaine perſons and their heires, ſo long as they ſhall pay the *Chancery* Prieſts their Wages, and in default of payment to limit the uſe over to other perſons and their Heires, and ſo in caſe of forfeiture through many degrees, and ſuch conveyances are as antient as *R.* 2. time.

Now for determining and extinguiſhing of uſes, I put the caſe of collaterall garranty before, and to that the notable

notable case of 14. *H.* 8. *Hautsemmes* Case, where this very point was in the principall case, for a Rent out of Land, and the Land it selfe in case of possession cannot stand together, but the rent shall bee extinct, but there the case is, that the use of the Land, and the use of the Rent shall stand well enough toge.her, for a Rent charge was granted by the Feoffee to one, that notice of the use, had and ruled, that the Rent was to the antient use, and both uses were in *Esse simul et semel*, and though *Brudnell* chiefe Justice urged the ground of possession to bee otherwise, yet he was over-ruled by the other three Justices, and *Brooke* said unto him, he thought he argued much for his pleasure; and to conclude, wee see the thing may be avoyded and determined by the Ceremonies and Acts, like unto those by which are created and raised; that which passeth by Livery ought to be avoyded by entry; that which passeth by Grant, by claime; that which passeth by way of charge, determineth by way of discharge: and so a use which is raised but by a declaration or limitation, may cease by words of Declaration or Limitation, as the Civill Law saith, in his *magis consentaneum est, quàm ut ijsdem modis res dissolvantur a quibus constituantur*: for the conception and progression of uses, I have for a president in them other Lawes, because States and Common-wealths have common accidents, and I find in the Civill Law, that that which commeth nearest in name to the use, is nothing like in matter, which is *Vsus fructus*, for *Vsus fructus et dominium* is with them, as with their particular tenancy and inheritance, but that which resembleth the use most is *fidei Commissio*, and therefore you shall finde in *Ius Lib.* 2. That they had a forme in Testaments, to give Inheritance to one to the use of another. *Heredem constituo Cajum rogo autem te Caie, ut hereditatem restituas*, and the Text of the Civilians saith, that for a

great time if the Heire did not as he was required *Cesty que use*, had no remedy at all, untill about the time of *Augustus Cæsar*, there grew in custome a flattering forme of trust, for they penned it thus: *Rogo te per salutem Augusti* or, *Per fortunam Augusti &c.* whereupon *Augustus* tooke the breach of trust to sound in derogation of himselfe, and made a Commission to the Prætor to give remedy in such Cases, whereupon within the space of a hundred yeares, these trusts did spring and speed so fast, as they were forced to have a particular Chancellor onely for uses, who was called *Prætor fidei Commissarius*, and long after the inconvenience of them being found, they resorted unto a Remedy much like unto this statute, for by two Decrees of Senate, called *Senatus consult. Frebesianum et Pegasianum*, they made *Cesty que use* to be Heire in substance. I have sought likewise, whether there bee any thing which maketh with them in our Law, and I finde the *Persian* chiefe Barron in the Argument of *Chudleyes* Case compareth them to Coppy-holders, and aptly for many respects.

First, because an use seemeth to bee an hereditament in the L. Court.

Secondly, this conceipt of Limitation hath beene troublesome in Coppy-holders as well as in Vses, for it hath beene of late dayes questioned, whether there should be Tenancy by the Courtesie, dis-continuances, and recoveries of Coppy-holders, in the nature of Inheritances at the Common Law, and still the judgements have weighed, that you must have particular Customes in Coppy-holds, as well as particular Reasons of Conscience in use, and the limitation recited.

And Thirdly, because they both grew to no remedy at all against the Lord, and were as tenancy at will, afterwards it grew to have remedy in *Chancery*, & afterwards against their Lords by Trespasse, at the Common-Law,

Law, and now laſtly the Law is taken by ſome, that they have remedy by *Ejectione firmæ* without a ſpeciall cuſtome of leaſing, doe no doubt in uſes, at the firſt the *Chancery* made queſtion to give remedy, untill uſes grew more generall, and the *Chancery* more eminent, and then they grew to have remedy in Conſcience, but they could never obtaine any manner of Remedy at the Common Law, neither againſt the Feoffee, nor againſt Strangers, but the Remedy againſt the Feoffee, was beſt by *Subpœna*, and the remedy againſt Strangers to the Feoffee.

Now for the Caſes whereupon uſes were but in practice, *Cooke* in his Reading doth ſay well, that they were produced ſometimes for feare, and many times for fraud; but I hold that neither of theſe Caſes were ſo much the reaſons of uſes, as another reaſon in the beginning, which was, that Lands by the Common Law of *England* were not Teſtamentary, or deviſeable, and of late yeares ſince the Statute, the Caſe of the conveyance for ſparing of Purchaſes, and Execution of Eſtates, and now laſt of all expreſſe liberty of Will in mens minds, affecting to have the aſſurance of their Eſtate, and Poſſeſſion to be revokeable in their owne times, and irrevocable after their owne times.

Now for the Commencement and proceeding of them, I have conſidered what it hath beene in courſe of Common Law, and what it hath beene in courſe of Statute for the Common Law, the conceipt of *Shelly* in 24. *H.* 8. and of *Polard* in 27. *H.* 8. ſeemeth to me to bee without ground, which was, that the uſe ſucceeded the Tenure, for that the Statute of *Quia emptores terrarum*, which was made 18. *E.* 1. had taken away the Tenure betweene the Feoffer and the Feoffee, and left it to the Lord *Paramount*, they ſaid that the Feoffment being then meerely without conſideration, ſhould therefore intend an uſe to the Feoffer, which cannot be, for by that

reaſon if the Feoffment before the Statute had beene made *Tenendum de Capitalibus Dominis*, as it muſt be; there ſhould have beene an Uſe unto the Feoffer before that Statute. And againe, if a Grant had beene made of ſuch things as conſiſts not in Tenure, as Advowſons, Rents, Villeins and the like, there ſhould have beene a Uſe of them, wherein the Law was quite contrary; for after the time that Uſes grew common, it was nevertheleſſe a great doubt whether things that did lye in Grant, did not carry a conſideration in themſelves becauſe of the Deed.

And therefore I do judge that the intendment of a Uſe to the Feoffer where the Feoffment was made without conſideration grew long after when Uſes waxed general; and for this reaſon, becauſe when Feoffments were made, and that it reſted doubtfull whether it were in uſe or in Purchaſe, becauſe Purchaſes were things notorious, and Uſes were things ſecret. The Chancellor thought it more convenient to put the Purchaſor to proove his conſideration, then the Feoffer and his Heires to prove the truſt, and ſo made the indentment towards the Uſe, and put the prooſe upon the Purchaſor.

And therefore as Uſes were at the Common Law in reaſon, for whatſoever is not by Statute, nor againſt Law may be ſaid to be at the Common Law, and both the generall truſt and the ſpeciall, were things not prohibited by the Law, though they were not remedied by the Law; ſo the Experience and practice of Uſes were not ancient, and my reaſons why I think ſo, are theſe.

Firſt, I cannot find in my Evidence before King *R.* 2. his time, the clauſe *ad opus et uſum*, and the very Latin phraſe was much purer, as you may ſee by *Bractons* Writing, and by ancient Patents and Deeds, and chiefly by the Regiſter of Writs, which is good Latin; wherein this phraſe (*ad opus & uſum*) and the Words (*ad opus*) is a barbarous phraſe, and like enough to be in the pennin

of ſome Chaplaine that was not much paſt his Grammer, where he had found *Opus & uſus*, coupled together, and that they did governe an Ablative caſe, as they do indeed ſince this Statute, for they take away the Land and put them into a conveyance.

Secondly, I find in no private Act of Attainder in the clauſe of Forfeiture of Lands (S) which he hath in poſſeſſion or in Uſe, untill *Ed.* 4. his Reigne.

Thirdly, I find the Word (*uſe*) in no Statute untill 7. *Rich.* 2. *cap.* 11. of Proviſoes, and in 15. *Ric.* 2. of *Mortmaine*.

Fourthly, I collect out of *Cookes* ſpeech in 8. *Edw.* 4. where he ſayth that by the advice of all the Judges, it was thought that the *Subpœna* did not lye againſt the Heire of the Feoffee which was in by Law, but *Ceſty que uſe* was driven to his Bill in Parliament, that Uſes even in that time were but in their infancy; for no doubt but at the firſt the Chancery made difficulty to give Remedy at all, but to leave it to the particular Conſcience of the Feoffee: But after the Chancery grew abſolute, as may appeare by the Statute of 15. *Hen.* 6. that complaints in Chancery ſhould enter into Bond to prove their ſuggeſtions, which ſeemeth that the Chancery at that time began to imbrace too farre, and was uſed for vexation; yet nevertheleſſe it made ſcruple to give remedy againſt the Heire being in by Act in Law though he were privy, ſo that it cannot be that Uſes had beene of any great continuance when they made a queſtion: As for the Caſe of Matrimony, *Prelomti*, it hath no affinity with Uſes, for whereſoever there was remedy at the Common-Law by Action, it cannot be intended to be of the nature of a Uſe.

And for the Booke commonly vouched of *Aſſ.* where the Earle calleth the poſſeſſion of a Conizee upon a Fine levied by conſent an entry in *Auterdroit* and 44. of *E.* 3.

where

where there is mention of the Feoffors that sued by petition to the King, they be but implications of no moment. So as it appeareth the first practice of Uses was about *Richard* 2. his time, and the great multiplying and over-spreading of them was partly during the Wars in *France*, which drew most of the Nobility to be absent from their Possessions, and partly during the time of the Trouble and Civill War betweene the two houses about the Title of the Crowne.

Now to conclude the Progression of Uses in course of Statutes, I do note three speciall points.

1 That a Use had never any force at all, at the Common-Law, but by Statute Law.

2 That there was never any Statute made directly for the benefit of *Cesty que Use*, as that the Discent of an Use should toll an Entry, or that a Release should be good to the partner of the profits or the like; but alwayes for the benefit of Strangers and other persons against *Cesty que use*, and his Feoffees: For though by the Statute of *Richard* 3. he might alter his Feoffees, yet that was not the scope of the Statute, but to make good his assurance to other persons, and the other came in *Et obliquo*.

3 That the speciall intent unlawfull and covenous was the Originall of Uses, though after it induced to the lawfull intent generall and speciall; For 5. *Edward* 3. is the first Statute I finde, wherein mention is made of the taking of profits by one, where the Estate in Law is another.

For as to the opinion in 27. *Henr.* 8. that in case of the Statute of *Marlebridge*, the Feoffors took the profits, it is but a conceite; for the Law is this day, that if a man infeoffee his Eldest Sonne within age, and without consideration, although the profits be taken to the use of the Sonne; yet it is a Feoffment within the Statute of *Religiosis*; and as for 7. *Edward* 1. which prohi-

prohibits generally that Religious persons should not purchase *Arte vel ingenio*, yet it maketh no mention of a Vse, but it saith, *Colore donationis termini vel alicujus tituli, reciting* there three formes of conveyances, the gift, the long Lease, and faigned Recovery, which gift cannot bee understood of a gift to a Stranger to their use, for that came to be holpen by 15: *Richard* 2. long after, but to proceed in 5. *Edward* 3. a Statute was made for the relieſe of Creditors against such as made covin gifts of their Lands, and goods, and conveyed their bodies into Sanctuaries, there living high upon others goods, and therefore that Statute made their Lands liable to their Creditors Executions in that particular Case, if they tooke the profits: In 5. *Richard* 2. a Statute was made for relieſe of those as had right of Action, against those as had renounced the tenancy of the *Præcipe* from them, sometimes by infeoffing great persons, for maintenance, and sometimes by secret Feoffments to others, whereof the Defendants could have no notice, and therefore the Statute maketh the recovery good in all Actions against the first Feoffees as they tooke the profits, and see that the Defendants bring their Action within a yeare at their expulsion 2. *Richard* 2. *Cap.* 3. *Session* 2. an imperfection of the Statute of 50. *Edward* 3. was holpen, for whereas the statute tooke no place, but where the Defendant appeared, and so was frustrated, the Statute giveth upon Proclamation, made at the Gate of the place priviledged, that the Land should be liable without apparance, in 7. *R.* 2.

A Statute was made for the restraint of Aliens, to take thy Benefices, or dignities Eccleſiasticall, or Farmes of Administration to them, without the Kings speciall Lycence, upon paine of the Statute of Provisors, which being remedied by a former Statute, where the Alien tooke it to his owne use: it is by that Statute remedied, where the Alien tooke it to the use of another, as it is

ſaid in the Booke, though I gheſſe, that if the Record were ſearched, it ſhould be if any other purchaſed to the uſe of an Alien, and that the words (or to the uſe of another) ſhould be (or any other to his uſe) 15. *Rich.* 2. *Cap.* 5. a Statute was made for the reliefe of Lords againſt *Mortmayne*, where Feoffments were made to the uſe of Corporations, and an Ordinance made that for Feoffments paſt, the Feoffees ſhould before a day, either purchaſe Lycence to amortiſe them, or alien them to ſome other uſe, or other Feoffments to come, they ſhould bee within the Statute of *Mortmayne*, 4. *Hen.* 4. *Cap.* 7. the Statute of 17. *Richard* 2. is inlarged in the limitation of time, for whereas the ſtatute did limit the Action to be brought within the yeare of the Feoffment: This Statute in Caſe of a Diſſeiſin extends the time to the life of the Diſſeiſor, and in all other Actions, leaves it to the yeares, from the time of the Action growne 11. *Henry* 6. *Cap.* 3. that Statute of 4. *Henry* 4, is declared, becauſe the conceipt was upon the Statute, that in Caſe of Diſſeiſin the limitation of the life of the Diſſeiſor went onely to the aſſiſe of *Non et diſſeiſin*, and to no other Action, and therefore that Statute declareth the former Law to extend to all other Actions, grounded upon *Novel diſſeiſin* 11. *Henry* 6. *Cap.* 5. A Statute was made for reliefe of him in remainder againſt particular Tenants, for Lives, or yeares, that Aſſigned over their Eſtates, and tooke the profits, and then committed waſt againſt them, therefore this Statute giveth an Action of waſt, being proviſors of the profits, in all this courſe of Statutes no reliefe is given to Purchaſors, that come in by the party, but to ſuch as come in by Law, as Defendants in *Præcipes*, whether they be Creditors, Diſſeiſors, or Leſſors, and that onely of *Mortmayne*, and note alſo that they be all in Caſes of ſpeciall Covenous intents, as to defeate Executions, tenancy to the *Præcipe*, and the Statute of *Mortmayne*,

as

as Proviſors from 11. *Henry* 6. to 1. *R.* 3. being the ſpace of fifty yeares, there is a ſilence of Vſes in the Statute Booke, which was at that time when no queſtion they were favoured moſt, in 1. *Richard* 3. *Cap.* 1. commeth the great Statute for reliefe of thoſe that come in by the party, and at that time an uſe appeareth in his likeneſſe, for there is not a word ſpoken of taking the profits, to deſcribe a uſe by, but of clayming to a uſe, and this Statute ordayned that all Gifts, Feoffments, Grants, &c. ſhall be good againſt the Feoffors, Dowers and Grantors, and all other perſons clayming onely to their uſe, ſo as here the Purchaſor was fully relieved, and *Ceſty que uſe* was *obiter* enabled to charge his Feoffees, becauſe there were no words in the Satute of Feoffments, Grants, &c. upon good conſideration, but generally in *Henry* 7. time, new Statutes were made for further helpe and remedy to thoſe that came in by Act in Law, as firſt 11. *Henry* 7. *Cap.* 1. a *Formedon* is given without limitation of time againſt *Ceſty que uſe*, and *obiter*, becauſe they make him a Tenent, they give him advantage of a Tenant, as of age and voucher, *quere* 4. *Henry* 7. 17. the Ward-ſhip of the Heire of *Ceſty que uſe*, is dying, and no Will declared is given to the Lord, as if he had dyed ſeiſed in Demeaſne, and Action of waſt given to the Heire againſt the Gardian, and dammages, if the Lord were barr'd in his writ of Ward, and reliefe is likewiſe given unto the Lord, if the heire holding the Knights ſervice, be of full age 19. *Henry* 7. *Cap.* 5. there is reliefe given in three Caſes, firſt to the Creditors upon matters of Record, as upon Recognizance, Statute, or Judgement, whereof the two former were not ayded at all by any Statute, and the laſt was ayded by a Statute of 50. *E.* 3. and 2. *Richard* 2. onely in Caſe of Sanctuary men. Secondly, to the Lords in ſoccage for their reliefe, and Herriots upon death, which was omitted in the 4. *Henry* 7. and laſtly to the Lords

of Villeyns, upon a purchaſe of their Villeyns in uſe, 13. *Henry* 8. *Cap.* 10. a further Remedy was given in a Caſe, like unto the caſe of *Mortmayne*, for in the Statute of 15. *Richard* 2. remedy was given where the uſe came, *Ad manum mortuam*, which was when it came to ſome Corporation: now when uſes were limited to a thing, Act, or worke, and to a body, as to the reparation of a Church, or an Abbot, or to a guild, or Fraternities, as are onely in reputation, but not incorporate, as to Pariſhes, or ſuch guilds or Fraternities as are onely in reputation, but not incorporate that Caſe was omitted, which by this Statute is remedied, not by way of giving entry unto the Lord, but by way of making the uſe utterly voyd, neither doth the Statute expreſſe to whoſe benefit the uſe ſhall be made voyd, either the Feoffor, or Feoffee, but leaveth it to Law, and addeth a Proviſoe, that uſes may bee limited twenty yeares from the gift, and no longer.

This is the whole courſe of Statute Law before this Statute, touching Uſes, thus have I ſet forth unto you the nature and definition of an Vſe, the differences and truſt of an Vſe and the parts and qualities of it, and by what Rules and termings Uſes ſhall bee guided and ordered, by a Preſident of them in our Lawes, the cauſes of the ſpringing and ſpreading of Uſes, the continuance of them, and the proceedings that they have had both in Common Law, and Statute Law, whereby it may appeare, that a Vſe is no more but a generall truſt, when any one will truſt the Conſcience of another better then his owne Eſtate and Poſſeſſion, which is accident or event of humane Society, which hath bin, and will be in all Lawes, and therefore was at the Common Law, which is common reaſon. *Fitz. Herbert* ſaith in the 14. *Henry* 8. common reaſon is Common Law, and not Conſcience; but common reaſons doth define that Uſes ſhould be remedied in Conſcience, and not in Courts of Law,

Law, and ordered by Rules in Conſcience, and not by ſtreight Rules of Law; for the Common Law hath a kind of a Rule and ſurvey over the *Chancery*, and therefore we may truely conclude, that the force and ſtrength that a Vſe had or hath in Conſcience, is by Common Law, and the force that it had or hath by Common Law is onely by Statutes.

Now followeth in time and matter, the conſideration of this Statute of principall labour, for thoſe former conſiderations which wee have handled ſerve but for introduction.

This Statute (as it is the Statute which of all other hath the greateſt power and operation over the Heritages of the Realme, ſo howſoever it hath beene by the humour of the time perverted in expoſition, yet in it ſelfe is moſt perfectly and exactly conceived and penned of any Law in the Booke, induced with the moſt declaring and perſwading Preamble, conſiſting and ſtanding upon the wiſeſt and fitteſt Ordinances, and qualified with the moſt fore-ſeeing and circumſpect ſavings and promiſes, and laſtly the pondred in all the words and clauſes of it of any Statute that I find, but before I come to the Statute it ſelfe, I will note unto you three matters of Circumſtance.

The time of the Statute. 1.
The Title of it. 2.
The Preſident or patterne of it. 3.

For the time of it was in 27. *Henry* 8. when the King was in full peace, and a wealthy and flouriſhing Eſtate, in which nature of time men are moſt carefull of their Poſſeſſions, aſwell becauſe Purchaſes are moſt ſtirring: as againe, becauſe the Purchaſor when hee is full, is no leſſe carefull of his aſſurance to his Children, and

of disposing that which he hath gotten, then hee was of his bargaine for the compassing thereof.

About that time the Realme likewise began to be infranchised from the Tributes of *Rome*, and the Possessions that had beene in *Mortmayne* began to stirre abroad, for this yeare was the suppression of the smaller Houses of Religion, all tending to plenty, and purchasing, and this Statute came in consort with divers excellent Statutes, made for the Kingdome in the same Parliament, as the reduction of *Wales* to a more civill Government, the re-edifying of diverse Cities and Townes, the suppressing of depopulation and inclosures.

For the Title, it hath one Title in the Role, and another in course of Pleading, the Title in the Role is no solemne Title, but an Act title (5) an Act expressing an Order for Uses and Will, the Title in course of Pleading is, *Statutum de usibus, in Possessionem transferendis*, wherein *Walmsly Justice* noted well 4. *Regnæ*, that if a man looke to the working of the Statute, hee would thinke that it should be turned the other way, *De possessionibus ad usus transferendis*, for that is the course of the Statute, to bring Possession to the Vse, but the Title is framed not according to the worke of the Statute, but according to the scope and intention of the Statute, *Nam quod primum est in intentione, ultimum est in operatione*, the intention of the Statute by carrying the Possession to the use, is to turne the use to a Possession, for the words are not *De possessionibus ad usus transferendis*, and as the Grammarian saith, *Præpositio ad, denotat notam actionis, sed prepositio (in) cum Accusativo denotat notam alterationis*, and therefore *Kingsmill* Justice in the same Case saith, that the meaning of the Statute was, to make a transsubstantiation of the use unto a Possession; but it is to be noted, that Titles of Acts of Parliament severally came in, but in the 5. *Henry* 8. for before that time that was but one Title of all the Acts made

made in one Parliament, and that was no Title neither, but a generall Preface of the good intent of the King, but now it is parcell of the Record.

For the Preſident of this Statute upon which it is drawne, I doe finde by the firſt *Richard* 3. whereupon you may ſee the very mould whereon this Statute was made, that the ſaid King having beene infeoffed (before he uſurped) to Uſes, as it was ordained that the Land whereof he was joyntly infeoffed as if hee had not beene named, and where he was ſolely infeoffed, it ſhould bee in *Ceſty que uſe*, in Eſtate as he had the uſe.

Now to come to the Statute it ſelfe, the Statute conſiſteth as other Lawes doe upon a Preamble, the Body of the Law, and certaine ſaving, and Premiſſes. The Preamble ſetteth forth the inconveniences, the Body of the Law giveth the Remedy, and the ſavings and Proviſoes take away the inconveniences of the remedy; for new Lands are like the Apothecaries Druggs, though they remedy the Diſeaſe, yet they trouble the body, and therefore they uſe to correct with Spices, ſo it is not poſſible to find a Remedy for any miſchiefe in the Common Wealth, but it will beget ſome new miſchiefe, and therefore they ſpice their Lawes with Proviſoes to correct and qualifie them.

The Preamble of the Law was juſtly commended by *Popham* chiefe Juſtice in 36. *Reginæ*, where hee ſaith, that there is little need to ſearch and collect out of Caſes before the ſtatute, what the miſchiefe was, which the ſcope of the Statute was to redreſſe, becauſe there is a ſhorter way offered us, by the ſufficiency and fulneſſe of the Preamble, and therefore it is good to conſider it, and ponder it throughly.

The Preamble hath three parts.

Firſt a recitall of the principall inconveniences, which is the root of all the reſt. 1.

Secondly,

2. Secondly, an enumeration of diverse particular inconveniences as branches of the former.

3. Thirdly, a taste or briefe note of the remedy that the Statute meaneth to apply; the principall inconvenience which is *Radix omnium malorum*, is the directing from the grounds and principalls of the Common Law, by inventing a meane to transfer Lands and Inheritances without any solemnity, or Act notorious, so as the whole Statute is to be expounded strongly towards the extinguishment of all conveyances, whereby the Free hold, or Inheritance may passe without any new confections of Deeds, Executions of Estate or entryes, except it bee where the Estate is of privity and dependance one towards the other, in which Cases *Mutatis mutandis*, they might passe by the Rules of the Common Law.

The particular inconveniences by the Law rehearsed may be reduced into foure heads.

1. First, that these conveyances in use are weake for consideration.

2. Secondly, that they are obscure and doubtfull for tryall.

3. Thirdly, that they are dangerous for want of notice and publication.

4. Fourthly, that they are exempted from all such Titles as the Law subjecteth Possessions unto.

The first inconvenience lighteth upon Heires.
The second upon Jurors and Witnesses.
The third upon Purchasors.
The fourth upon such as come in by gift in Law.

All which are persons that the Law doth principally respect and favour.

For the first of these are three impediments (to the judgement of man) in disposing justly and advisedly of his Estate. (5)

First

First, trouble of mind. 1.
Secondly, want of time. 2.
Thirdly, of wise and faithfull Counsell about him. 3.

And all these three the Statute did finde to bee in the disposition of an Use by Will, whereof followed the unjust dis-inheresin of Heires, now the favour of Law unto Heires appeareth in many parts of the Law, as the Law of discent priviledgeth the Possession of the Heire, against the entry of him that hath right by the Law, no man shall warrant against his Heire, except he warrant against himselfe, and diverse other Cases too long to stand upon, and wee see the antient Law in *Glanvills* time was, that the Ancestor could not dis-inherit his Heire by Grant, or other Act executed in time of sicknesse, neither could he alien Land which had discended unto him, except it were for consideration of mony or service, but not to advance any younger Brother without the consent of the Heire.

For tryalls, no Law ever tooke a streighter course, that Evidence should not be perplexed, nor Juries inveigled, then the Common Law of *England*, as on the other side, never Law tooke a more precise and straight course with Juries, that they should give a direct verdict, for whereas in manner all Lawes doe give the Tryers, or Jurors (which in other Lawes are called Judges *De facto*) to give no liquet, that is, to give no verdict at all, and so the Case to stand abated; our Law enforceth them to a direct verdict, generall or speciall, and whereas other Lawes except of Plurality of voyces, to make a verdict, our Law enforceth them all to agree in one, and whereas other Lawes leave them to their owne time and ease, and to part, and to meete againe; our Law duresse and imprison them in the hardest manner, without light or comfort, untill they bee agreed, in consideration of straightnesse and coherson; it

is consonant, that the Law doe require in all matters brought to issue, that there be full proofe and evidence, and therefore if the matter in it selfe bee of that surety as in simple Contracts, which are made by paroll, without writing, it alloweth wager of Law.

In issue upon the meere right (which is a thing hardly to discerne (it alloweth wager of Battaile to spare Jurors, if time have wore out the markes and badges of truth: from time to time there have beene Statutes of limitation, where you shall find this mischiefe of Perjuries often recited; and lastly which is the matter in hand, all Inheritances could not passe but by Acts overt and notorious, as by Deeds, Livery, and Records.

For Purchasors (*Bona fide*) it may appeare that they were ever favoured in our Law, as first by the great favour of Warranties, which were ever for the helpe of Purchasors, as whereby the Law in 5. *Edw.* 3. time, the Disseisor could not enter upon the Feoffee in regard of the Warranty, so againe the Collaterall garranty which otherwise as a hard Law, grew in doubt onely upon favour of Purchasors, so was the binding of Fines at the Common Law, the invention and practice of Recoveries, to defeate the Statute of intayles, and many more grounds and learnings are to bee found, respect the quiet of the Possession of Purchasors, and therefore though the Statute of 1 *Richard* 3. had provided for the Purchasor in some sort; by enabling the Acts and conveyances of *Cesty que use*, yet nevertheless the State did not at all disable the Acts or charges of the Feoffees, and so as *Walmesly* Justice said 42. *Reginæ*, they played at double hand, for *Cesty que use* might sell, and the Feoffee might sell, which was a very great uncertainty to the Purchasor.

For the fourth Inconvenience towards those that come in by Law, conveyances in Uses were like priviledge

ledge places or liberties, for as there the Law doth no run, so upon such conveyances the Law could take no hold, but they were exempted from all Titles in Law, no man is so absolute Owner of his Possessions, but that the wisedome of the Law doth reserve certaine Titles unto others, and such persons come not in by the pleasure and disposition of the party, but by the Justice and consideration of Law, and therefore of all others they are most favour'd, and also they are principally three.

The Kings and Lords who lost the benefit of Attaindors, Fines for alienations, Escheates, Aydes, Herreots, Reliefes, &c. 1.

The Defendants in *Præcipes* either reall or personall, for Debt and Damages, who lost the benefit of their Recoveries and Executions. 2.

Tenants in Dower, and by the Curtesie, who lost their Estates and Tythes. 3.

First for the King, no Law doth endow the King or Soveraigne with more from Suites and Actions, his Possessions from interuption and disturbance, his Right from limitation of time, his Pattents and Gifts from all deceites and false suggestions: Next the King is the Lord, whose duties and rights the Law doth much favour, because the Law supposeth the Land did Originally come from him, for untill the Statute of *Quia emptores terrarum*, the Lords was not forced to distruct or dismember his Signiory or service, so untill 15. *Henry* 7. the Law was taken that the Lord upon his Title of Wardship should be put to a conizee of a Statute, or a Termor, so againe we see, that the Statute of *Mortmaine* was made to preserve the Lords Escheats and Wards: the Tenant in Dower is so much favoured, as that it is the common by word in the Law, that the Law favoureth three things.

1. Life.
2. Liberty.
3. Dower.

So in Caſe of Voucher, the Feme ſhall not be delayed, but ſhall recover againſt the Heire incontinent; ſo likewiſe of Tenant by courteſie it is called Tenancy by the Law of *England*, and therefore ſpecially favoured, as a proper conceipt and invention of our Law, ſo as againe the Law doth favour ſuch, as have antient Rights, and therefore it telleth us it is commonly ſaid, that a Right cannot dye: and that ground of Law, that a Free hold cannot bee in ſuſpence ſheweth it well, inſomuch that the Law will rather give the Land to the firſt commer, which we call an Occupant, then want a Tenant to a Strangers Action.

And againe, the other ancient ground of Law of Remitter, ſheweth that where the Tenant faileth without folly in the Defendant, the Law executeth the antient Right: To conclude therefore this point, when this practice of Feoffments in uſe did prejudice and dampnifie all thoſe perſons that the antient Common Law favour'd, and did abſolutely croſſe the wiſedome of the Law, to have conveyances conſiderate, and not odious, and to have Tryall thereupon cleare and not inveighed, it is no marvaile that the Statute concludeth, that their ſubtile imaginations and abuſes, tended to the utter ſubverſion of the ancient Common Lawes of this Realme.

The third part of the Preamble giveth a touch of the Remedy which the Statute intendeth to miniſter, conſiſting in two parts.

1. Firſt, the expiration of Feoffments.
2. Secondly, the taking away of the hurt, damage, and deceipt of the Uſes, out of which have bin gathered two extremities of opinions.

The

The first Opinion is, that the intention of the Statute was to discontinue, and banish all conveyances in Use, grounding themselves both upon the words, that the Statute doth not speake of the extinguishment or extirpation of the Use *viz.* by an unity of Possession, but of an extinguishment or extirpation of the Feoffment &c. which is the conveyance it selfe.

Secondly, out of the words (abuse and errours) heretofore used and accustomed, as if Uses had not beene at the Common Law, but had onely an erroneous device or practice.

To both which I answer.

To the former, that the extirpation which the Statute meant was plaine, to bee of the Feoffees Estate, and not to the forme of conveyances.

To the latter I say, that for words (Abuse) that may bee an abuse of the Law which is not against Law, as the taking long Leases at this day of Land in *Capite*, to defraud Wardships is an abuse of the Law, which is not against Law, and by the words (Errour) the Statute meant by it, not a mistaking of the Law, but wandring or going astray or digressing from the antient practice of the Law unto a buy course, as when we say (*Erravimus cum patribus juris*) it is not meant of ignorance onely, but of perversity, but to prove that the Statute meant not to suppresse the forme of conveyances, there be 3. Reasons which are not answerable.

The first is, that the Statute in the very Branch thereof hath words, *De futuro* (s.) (that are seised, or hereafter shall be seised) and whereas it may be said that these words were put in, in regard of Uses suspended, by disseisins, and so no present seisin to the use,

untill a regreſſe of the Feoffees, that intendment is very particular, for commonly ſuch Caſes are brought in by Proviſoes, or ſpeciall Branches, and not intermixed in the body of a Statute, and it had beene eaſie for the Statute to have, or hereafter ſhall be ſeiſed upon any Feoffment &c. heretofore had or made.

The ſecond Reaſon is upon the words of the Statute of Inrolements, which ſaith, that no hereditaments ſhall paſſe, &c. or any Uſe thereof, &c. whereby it is manifeſt, that the Statute meant to leave the forme of conveyance with the addition of a further Ceremony.

The third Reaſon I make is out of the words of the Proviſor, where it is ſaid, that no primer Seiſin, Livery, no Fine, nor Alienation, ſhall bee taken for any Eſtate executed, by force of the Statute of 27. before the firſt of *May* 1536. but they ſhall be paid for Uſes, made and executed in Poſſeſſion for the time after, where the word (made) directly goeth to conveyances in uſe, made after the Statute, and can have no other underſtanding for the words (executed in Poſſeſſion) would have ſerved for the Caſe of regreſſe, and laſtly which is more then all, if they have had any ſuch intent, the Caſe being ſo generall and ſo plaine, they would have had words expreſſe, that every limitation of uſe made after the Statute, ſhould have beene voyd, and this was the Expoſition, as tradition goeth, that a Reader of *Grayes Inne*, which Read ſoone after the Statute, was in trouble for, and worthily, who as I ſuppoſe was Boy, whoſe Reading I could never ſee; but I doe now inſiſt upon it, becauſe now againe ſome in an immoderate invective againſt Uſes, doe relaps to the ſame opinion.

The ſecond Opinion which I called a contrary extremity is, that the Statute meant onely to remedy the miſchiefes in the Preamble, recited as they grew by reaſon of divided Uſes; and although the like miſchiefe may grow upon the contingent Uſes, yet the Statute had no

fore-

fore-ſight of them at that time, and ſo it was meerely a new Caſe not compriſed. Whereunto I anſwer, that it is the worke of the Statute to execute the divided Uſe, and therefore to make an Uſe voyd by this Statute which was good before, though it doth participate of the miſchiefe recited in the Statute, where to make a Law upon a Preamble without a perview, which were groſſy abſurd. But upon the queſtion what Uſes are executed, and what not; and whether out of Poſſeſſions of a diſſeiſor, or other Poſſeſſions out of privity or not, there you ſhall guide your Expoſition according to the Preamble, as ſhall be handled in my next dayes Diſcourſe, and ſo much touching the Preamble of this Law.

For the Body of the Law, I would wiſh all Readers that expound Statutes, to doe as Schollers are willed to doe, that is, firſt to ſeeke out the principall Verbe, that is to note and ſingle out the materiall words, whereupon the Statute is framed, for there are in every Statute certaine words, which are as veines where the life and bloud of the Statute commeth, and where all doubts doe ariſe, and the reſt are *Literæ mortuæ* fulfilling words.

The Body of the Statute conſiſteth upon two Parts.

Firſt, a Suppoſition, or Caſe put, as *Anderſon* 361. *Regina* calleth it.

Secondly, a Perview or Ordinance thereupon.

The Caſes of the Statute are three and every one hath his purview.

The generall Caſe.

The Caſe of Coſeoffees to the uſe of ſome of them.

And the generall Caſe of Feoffees to the Uſe or percemans of Rents or profits.

The generall Caſe is built upon Eight materiall words.

Foure on the part of the Feoffees.

Three

Three on the part of *Ceſty que uſe*, and one common to them both.

The firſt materiall word on the part of the Feoffees is the word (Perſon) This excludes all aliances, for there can be no truſt repos'd but in a perſon certaine, it excludes againe all Corporations, for they are evalled to a Uſe certaine, for note on the part of the Feoffer over the Statute inſiſts upon the word (Perſon) and in the part of *Ceſty que uſe*, that added body Politique.

The ſecond word materiall is the word (Seis'd) this excludes Chattells, the reaſon is, that the Statute meant to remit the Common Law, and not the Chattells might ever paſſe by Teſtament or by paroll, therefore the Uſe did not pervert them, it excludes Rights, for it is againſt the Rules of the Common Law to Grant, or Transferre Rights, and therefore the Statute would execute them.

Thirdly, it excludes contingent Uſes, becauſe the ſeiſin cannot be but to a Fee-ſimple of a Uſe, and when that is limited, the ſeiſm of the Feoffee is ſpent, for *Littleton* tells us that there are but two ſeiſins, one in *Dominio ut de feodo*, the other *Vt de feodo et jure*, and the Feoffee by the Common Law could execute, but the Fee-ſimple to Uſes preſent, and not Poſt Uſes, and therefore the Statute meant not to execute them.

The third materiall word is (Hereafter) that bringeth in Conveyances made after the Statute, it brings in againe conveyances made before, and diſturb'd by diſſeiſin, and recontinued after, for it is not ſaid infeoffed to Uſe hereafter ſeis'd.

The fourth word is (Hereditament) which is to be underſtood of thoſe things whereof an Inheritance is in *Eſſe*, for if I grant a Rent charge *de novo* for life to a Uſe, this is good enough, yet there is no Inheritance in being of this Rent, this word likewiſe excludes Annuities and Uſes themſelves, ſo that a Uſe cannot be to a uſe.

The

The first word on the part of *Cesty que use*, is the word (Use, Confidence or Trust) whereby it is plaine that the Statute meant to remedy the matter, and not words, and in all the Clauses it still carrieth the words.

The second word is the word (Person) againe which excludeth all aliances, it excludeth also alldent Uses which are not to Bodies, lively and naturall, as the building of a Church, the making of a Bridge, but here (as noted before) it is ever coupled with body Politicke.

The third word is the word (Other) for the Statute meant not to crosse the Common Law, now at this time Uses were growne to such a familiarity, as men could not thinke of Possession, but in course of Use, and so every man was seised to his owne Use, as well as to the Use of others; therefore becaus Statutes would not stirre nor turmoyle possessions setled at the Common Law, it putteth in precisely this word (Other) meaning the divided Use, and not the communed Use, and this causeth the Clause of joynt Feoffees to follow in a branch by it selfe, for else that Case had beene doubtfull upon this word (Other.)

The words that are common to both, are words expressing the conveyance whereby the Use ariseth, of which words, those that bred any question are (Agreement, Will, otherwise) whereby some have inferred that Uses might be raised by agreement paroll, so there were a consideration of mony, or other matter valuable, for it is expressed in the words before (Bargaines, Sale, and Contract) but of bloud, or lumed; the errour of which Collection appeareth in the word immediately following (s. Will) whereby they might aswell include, that a man seised of Land might raise an Use by Will, especially to any of his Sonnes or Kindred, where there is a reall consideration, and by that reason meane betwixt this Statute, and the Statute of 32.

of Wills, Lands, were deviſeable, eſpecially to any man Kindred, which was clearely otherwiſe, and therefor e thoſe words were put in, not in regard of Uſes raiſed b y thoſe conveniences, or without, or likewiſe by Will might be transferred, and there was a perſon ſeiſed to a Uſe, by force of that agreement or Will (s.) to the Uſe of the Aſſigne, and for the word (Otherwiſe) it ſhould by the generality of the word, include a Diſſeiſin to a Uſe, but the whole ſcope of the Statute croſſeth that which was to execute ſuch Uſes as were confidences and truſt, which could not be in Caſe of Diſſeiſin, for if there were a commandment precedent, then the Land was veſted in *Ceſty que uſe* upon the entry, and if the Diſſeiſin were of the Diſſeiſors owne head then no truſt, and thus much for the caſe of Suppoſition of this Statute, here follow the ordinance and purview thereupon.

The Purview hath two parts, the firſt *Operatio Statuti*, the effect that the Statute worketh, and there is *Modus operandi*, a fiction, or explanation how the Statute doth worke that effect. The effect is, that *Ceſty que uſe* ſhall be in poſſeſſion of like Eſtate as he hath in the Uſe, the fiction *quomodo* is, that the Statute will have the Poſſeſſion of *Ceſty que uſe*, as a new body compounded of matter and forme, and that the Feoffees ſhall give matter and ſubſtance, and the Uſe ſhall give forme and quality, the materiall words in the firſt part of the purview are foure.

The firſt words are (Remainder) and Reverture, the Statute having ſpoken before of Uſes in Fee-ſimple, in Tayle, for life, or yeares addeth, or otherwiſe (in Remainder reverture) whereby it is manifeſt, that the firſt words are to be underſtood of Uſes in Poſſeſſion, for there are two ſubſtantiall and eſſentiall differences of Eſtates, the one limiting the times, (for all Eſtates are but times of their continuances) the former maketh little difference of Fee-ſimple, Fee Tayle for life or yeares, and

the

the other maketh difference of Poſſeſſion as remainder, all other differences of Eſtate are but accidents, as ſhall be ſaid hereafter, theſe two the Statute meant to take hold of, and at the words, Remainder, and Reverture it ſtopps, it addes nor wordes, (Right, Title, or poſſibility) nor it hath not generall words (or otherwiſe) it is moſt plaine, that the Statute meant to execute no inferiour Uſes to Remainder or Reverture, that is to ſay, no poſſibility or contingences, but Eſtates, onely, ſuch as the Feoffees might have executed by Conſcience made: note alſo the very Letter of the Statute doth take notice of a difference betweene an Uſe in Remainder, and an Uſe in Reverture, which though it cannot properly, becauſe it doth not depend upon particular Eſtates, as Remainders doe, neither did then before the Statute draw any Tenures as Reverſions doe, yet the Statute intends that there is a difference when the particular Uſe, and the Uſe limited upon the particular Uſe are both new Uſes, in which Caſe it is a Uſe in Remainder, and where the particular Uſe is a new Uſe, and the remnant of the uſe is the old uſe, in which Caſe it is a uſe in Reverter.

The next materiall word is (from henceforth) which doth exclude all conceipt of relation that *Ceſty que uſe* ſhall not come in, as from the time of the firſt Feoffments, to uſe as *Bradnells* conceipt was in 14. *Henry* 8. that is, the Feoffee had granted a Rent charge, and *Ceſty que uſe* had made a Feoffment in Fee, by the Statute of 1. *Richard* 3. the Feoffee ſhould have held it diſcharged, becauſe the Act of *Ceſty que uſe* ſhall put the Feoffee in, as if *Ceſty que uſe* had beene ſeiſed in from the time of the firſt Uſe limited, and therefore the Statute doth take away all ſuch ambiguities, and expreſſeth that *Ceſty que uſe* ſhall bee in Poſſeſſion from henceforth,

that is, from the time of the Parliament for Uſes then in being, and from the time of the execution for Uſes limited after the Parliament.

The third materiall words are (Lawfull ſeiſin ſtate and Poſſeſſion) not a Poſſeſſion in Law onely, but a ſeiſin in Tayle, not a Title to enter into the Land, but an actuall eſtate.

The fourth words are of and in ſuch Eſtates as they had in the Uſe, that is to ſay, little Eſtates, Fee-ſimple, Fee Tayle, life for yeares at Will and Poſſeſſion, and Reverſion, which are the ſubſtantiall differences of Eſtates, as was ſaid before, but both their latter Clauſes are more fully perfected and expounded, by the branch of the fiction of the Statute which followes.

This branch of Fiction hath three materiall words or Clauſes: the firſt materiall Clauſe is, that the Eſtate, Right, Title, and Poſſeſſion that was in ſuch perſon &c. ſhall bee in *Ceſty que uſe*, for that the matter and ſubſtance of the Eſtate of *Ceſty que uſe* is the Eſtate of the Feoffee, and more hee cannot have, ſo as if the Uſe were limited to *Ceſty que uſe* and his Heires, and the Eſtate out of which it was limited was but an Eſtate for life, *Ceſty que uſe* can have no Inheritance, ſo if when the Statute came the Heire of the Feoffee had not entred after the death of his Anceſtor, but had onely a Poſſeſſion in Law, *Ceſty que uſe* in that Caſe ſhould not bring an Aſſize before entry, becauſe the Heire of the Feoffee could not, ſo that the matter whereupon the Uſe muſt work is the Feoffees Eſtate: but note here, whereas before when the Statute ſpeakes of the Uſes, it ſpake onely of Uſes in Poſſeſſion, Remainder and Treverter, but not in Title or Right, now when the Statute ſpeakes what ſhall bee taken from the Feoffee, it ſpeakes of Title and Right, ſo that the Statute takes

more

more from the Feoffee then it executes presently in Case, where there are uses in contingence which are but Titles.

The second word is (Cleerely) which seemes properly and directly to meet with the conceipt of *Scintilla Iuris* as well as the words in the Preamble of extirping and extinguishing such Feoffments, so is their Estates is clearely extinct.

The third materiall Clause is after such quality, manners, forme and condition as they had in the Vse; so as now as the Feoffees Estate gives matter, so the Vse gives forme; and as in the first Clause the Vse was indowed with the Possession in points of Estate, so there it is indowed with the Possession in all accidents and Circumstances of Estate, wherein first note that it is grosse and absurd to expound the forme of the Vse any whit to destroy the substance of the Estate as to make a doubt, (because the use gave no Dower or Tenancy by the courtesie) that therefore the Possession when it is transferred would doe so likewise: no, but the Statute meant such quality, manner, forme and condition, as it is not repugnant to the corporall presence and possession of the Estate.

Next for the word (Condition) I doe not hold it to be put in for Uses upon condition, though it be also comprized within the generall words, but because I would have things stood upon learnedly, and according to the true sence, I hold it but for an explaining or word of the effect, as it is in the Statute of 26. of *Treasons*, where it is said, that the Offender shall be attainded of the evert Fact by men of their condition (in this place) that is to say, of their degree or sort, and so the word Condition in this place is no more, but in like quality, manner, forme, and degree or sort, so as all these words amount, but to (*modo et forma.*) Hence therefore all circumstances of Estate are comprehended as sole seisin, or

joyntly seisin, by intierties, or by moyties, a circumstance of Estate to have age as comming in by Discent, or not age as Purchasor, or circumstance of Estate discendable to the Heire of the part of the Father, or of the part of the Mother. A circumstance of Estate conditionall or absolute, remitted or not remitted with a condition of inter-marriage, or without all these are accidents and circumstances of Estate, in all which the Possession shall ensue the nature and quality of the Use, and this much of the first Case which is the generall case.

The second Case of the joynt Feoffees needs no Exposition, for it peruseth the penning of the generall case, onely this I will note, that although it had beene omitted, yet the Law upon the first Case would have beene taken as the case provided, so that it rather in explanation than an addition, for turne that Case the other way, that one were infeoffed to the Use of himselfe, I hold the Law to bee, that in the former Case they shall bee seised joyntly, and so in the latter Case *Cesty que use* shall be seised solely; for the word (Other) it shall bee qualified by the construction of Cases, as shall appeare when I come to my Division; but because this Case of Cofeoffees to the use of one of them was a generall Case in the Realme, therefore they fore-saw it, oppress'd it precisely, and passed over the case *E converso*, which was but especiall; and care, and they were loth to bring in this Case, by inserting the word onely unto the first Case (S) to have penned it to the use onely of other persons, for they had experience what doubt the word onely bred upon the Statute of 1. *Richard* 3. after this third Case, and before the third Case of Rents comes in the second saving, and the reason of it is worth the noting, why the savings are interlaced before the third Case, the reason of it is, because the third case needeth no saving, and the first two Cases

did

did need savings, and that is the reason of that againe.

It is a generhll ground, that where an Act of Parliament is Donor, if it be penned with an (*ac si*) it is not a saving, for it is a speciall gift, and not a generall gift, which includes all Rights, and therefore in 11 *Henry* 7. whereupon the alienation of Women, the Statute intitles the Heire of him in remainder to enter, you finde never a Stranger, because the Statute gives entry not (*Simpliciter*) but within an (*ac si*) as if no Alienation had beene made, or if the feme had beene naturally dead, Strangers that had right might have entred, and therefore no saving needs, so in the Statute of 32. of Leases, the Statute enacts, that the Leases shall be good and effectuall in Law, as if the lessor had beene seised of a good and perfect Estate in Fee-simple, and therefore you finde no saving in the Statute, and so likewise of divers other Statutes doe likewise, where a Statute doth make a gift or Title good, specially against certaine persons there needs no saving, except it bee to exempt some of those persons, as in the Statute of 1. *R.* 3. now to apply this to case of Rents, which is penned with an (*ac si*) (s.) as if a sufficient grant, or lawfull conveyance had beene made, or executed by such as were seised, why if such a grant of a Rent had beene made, one that had an antient Right might have entred and have avoyded the charge, and therefore no saving needeth, but the second first Cases are not penned with an (*ac si*) but absolute, that *Cesty que use* shall be adjudged in Estate and Possession, which is a Judgement of Parliament stronger then any Fine, to bind all Rights, nay it hath further words (s.) in lawfull Estate and Possession, which maketh it the stronger then any in the first Clause. for if the words onely had stood upon the second Clause (s.) that the Estate of the Feoffee should bee in *Cesty que use*, then perhaps the gift should have beene speciall, and so the saving superfluous, and this note is materiall in re-

gard

gard of the great queſtion, whether the Feoffees may make any regreſſe, which Opinion (I meane that no regreſſe is left unto them) is principally to bee argued out of the ſaving; as ſhall be now declared: for the ſavings are two in number, the firſt ſaveth all Strangers Rights, with an exception of the Feoffees: the ſecond is a ſaving out of the exception of the firſt ſaving (s.) of the Feoffees in caſe where they claime to their own proper uſe: it had beene eaſie in the firſt ſaving out of the Statute) other then ſuch perſons as are ſeiſed, or hereafter ſhould bee ſeiſed to any uſe) to have added to theſe words (executed by this Statute) or in the ſecond ſaving to have added unto the words (clayming to their proper uſe) theſe words (or to the uſe of any other, and executed by this Statute, but the regreſſe of the Feoffee is ſhut out betweene the two ſavings, for it is the right of a Perſon clayming to an Uſe, and not unto his owne proper uſe, but it is to bee added, that the firſt ſaving is not to bee underſtood as the letter implyeth, that Feoffees to uſe ſhall bee barr'd of their regreſſe, in Caſe that it bee of another Feoffment then that whereupon the Statute hath wrought, but upon the ſame Feoffment, as if the Feoffee before the Statute had beene diſeiſed, and the diſſeis'd had made a Feoffment in Fee to *I. D.* his uſe, and then the Statute came, this executeth the Uſe of the ſecond Feoffment, but the firſt Feoffees may make a regreſſe, and they yet claime to an Uſe, but not by that Feoffment upon which the Statute hath wrought.

Now

NOw followeth the third Caſe of the Statute touching execution of Rents, wherein the materiall words are foure :

Firſt, whereas divers perſons are ſeiſed, which hath bred a doubt that it ſhould onely goe to Rents in Uſe, at the time of the Statute; but it is Explained in the Clauſe following (S) as if a grant had beene made to them by ſuch as, are, or ſhall be ſeiſed.

The ſecond word is (*Profit*) for in the putting of the Caſe, the Statute ſpeaketh of a Rent; but after in the Purview is added theſe words (or *profit*.)

The third word is (*ac ſi*) (S) that they ſhall have the (S) as if a ſufficient grant or lawfull conveyance had bin made and Executed unto them.

The fourth words are the words of Liberty and Remedies attending upon ſuch Rent (S) that hee ſhall diſtraine, &c. and have ſuch Suits, Entries, and Remedies relying againe with an (*ac ſi*) as if the grant had beene made with ſuch collaterall penalties and advantages.

Now for the Proviſoes, the Makers of this Law did ſo abound with policy and diſcerning, as they did not onely fore-ſee ſuch miſchiefes as were incident to this new Law immediately, but likewiſe ſuch as were conſequent in a remote degree, and therefore beſides the expreſſe Proviſoes, they did adde three new Proviſoes which are in themſelves ſubſtractive Lawes, for foreſeeing that by the Execution of Uſes, Wills formerly made ſhould be over-throwne : They made an ordinance for Wills, fore-ſeeing likewiſe, that by execution of Uſes, women ſhould be doubly advanced : They made an ordinance for Dowers and Jointures, foreſeeing againe, that the execution of Uſes would make

franktenement paſſe by Contracts parol. They made an ordinance for inrollments of Bargaines and Sales, the two former they inſerted into this Law, and the third they diſtinguiſhed into a Law apart, but without any preamble as may appeare, being but a Proviſo to this Statute, beſides all theſe proviſionall Lawes; and beſides five Proviſors, whereof three attend upon the Law of Jointure, and two borne in *Wales*, which are not materiall to the purpoſe in hand. There are ſixe proviſoes which are naturall and true members and limbs of the Statute, whereof foure concerne the part of *Ceſty que uſe*, and two concerne the part of the Feoffees: The foure which concerne the part of *Ceſty que uſe*, tend all to ſave him from prejudice by the execution of the eſtate.

The firſt ſaveth him from the extinguiſhment of any Statute or Recognizance, as if a man had an Extent of a hundred Acres, and an Uſe of the inheritance of one. Now the Statute executing the poſſeſſion to that one, would have extinguiſht his Extent being intire in all the reſt: or as if the Commiſſioner of a Statute having ten Acres lyable to the Statute had made a Feoffment in Fee to a Stranger of two, and after had made a Feoffment in Fee to the uſe of the Conuzee and his Heires: And upon this Proviſo there ariſe three Queſtions: Firſt, whether this Proviſo were not ſuperfluous, in regard that *Ceſty que uſe* was comprehended in the generall, ſaving though the Feoffees be excluded.

Secondly, whether this Proviſo doth ſave Statutes or Executions, with an apportionment and Entire.

Thirdly, becauſe it is penned indefinitively, in point of time, whether it ſhall goe to Uſes limitted after the Statute, as well as to thoſe that were in being all the time of the Statute, which doubt is rather inforced by this Reaſon, becauſe there was for Uſes at the time of the Statute, for that the Execution of the Statute might

be

be wayved, but both poſſeſſion and Uſe ſince the Statute, may be wayved.

The ſecond proviſo ſaveth *Ceſty que vſe* from the charge of *primer Seiſin liveries Ouſter le maines*, and ſuch other duties to the King, with an expreſſe limitation of Time that he ſhalbe diſcharged for the time paſt, and charged for the time to come in a King S: *May* 1536. to be *communis terminus*.

The third proviſo doth the like for Fines, Reliefes, and Herriots, diſcharging them for the time paſt, and ſpeaking nothing of the Time to come.

The fourth proviſo giveth to *Ceſty que uſe* all collaterall benefits of Vouchers, Aides, priers, Actions of waſt, Treſpaſſe, conditions broken, and which the Feoffees might have had; and this is expreſly limitted for Eſtates executed before 1. *May* 1536. and this proviſo giveth occaſion to intend that none of theſe benefits would have beene carried to *Ceſty que vſe* by the generall words in the body of the Law (S) that the Feoffees eſtate, right, Title, and poſſeſſion, &c.

For the two proviſoes on the part of the Tertenant, they both concerne the ſaving of ſtrangers from prejudice, &c.

The firſt ſaves Actions depending againſt the Feoffees, that they ſhall not abate.

The ſecond ſaves Wardſhips, Liveries, and *Ouſter Le maines*, whereof Title was veſted in regard of the Heire of the Feoffee, and this in caſe of the King only.

What Persons may be seised to an Use, and what not.

What persons may be Cesty que use, and what not.

What Persons may declare an use; and what not.

THough I have opened the Statute in order of words, yet I will make my Division in order of matter, viz.

1. The rayſing of Uſes.
2. The interruption of Vſes.
3. The Executing of Vſes.

Againe, The raiſing of Uſes doth eaſily divide it ſelfe into three parts.

The perſons that are Actors to the Conveyance to Uſe.

The Uſe it ſelfe.

The forme of the Conveyance.

Then it is firſt to be ſeene what perſons may be ſeiſed to an Uſe, and what not, and what perſons may be *Ceſty que uſe*, and what not.

The King cannot be ſeiſed to an Uſe; no,not where he taketh in his naturall body and to ſome purpoſe as a common perſon, and therefore if Land be given to the King, and *I. D. per terme de lour vies*, this Uſe is void for a moity.

Like Law is, if the King be ſeiſed of Land in the right of his Dutchy of *Lancaſter*, and covenanteth by his letters Pattents under the Dutchy Seale to ſtand ſeiſed to the uſe of his Sonne,nothing paſſeth.

Like Law,if King *R.* 3.who was Feoffer to divers uſes before he took upon him the Crowne, had after hee was King by his Letters pattents granted the Land over, the uſes had not bin renewed.

The Queene (ſpeaking not of an Imperiall Queene by

by marriage) cannot be seised to an use, though she be a body inabled to grant and purchase without the King: Yet in regard of the government and interest the King hath in her possession she cannot be seised to an use.

A Corporation cannot be seised to an use, because their capacity is to a use certaine; againe, because they cannot Execute an Estate without doing wrong to their Corporation or Founder; but chiefly because of the letter of this Statute which (in any clause when it speaketh of the Feoffee) resteth only upon the word (person,) but when it speaketh of *Cesty que use*, it addeth person, or body politicke.

If a Bishop bargaine or sell Lands whereof hee is seised in the right of his Sea; this is good during his life; otherwise it is where a Bishop is infeoffed to him and his Successors to the use of *I. D.* and his heires, that is not good, no not for the Bishops life, but the use is meerely voyd.

Contrary Law, of Tenant in Taile, for if I give Land in Taile by Deed since the Statute to *A.* to the use of *B.* and his heires; *B.* hath a fee-simple determinable upon the death of *A* without issue. And like Law, though doubtfull before the Statute was, for the chiefe reason which bred the doubt before the Statute was, because Tenant in Tayle could not Execute an Estate without wrong; but that since the Statute is quite taken away, because the Statute saveth no right of intayle, as the Statute of 1. *R.* 3. did, and that reason likewise might have bin answered before the Statute, in regard of the common recovery.

A feme Covert and an Infant, though under yeares of discretion, may be seised to an use; for aswell as Land might descend unto them from a Feoffee to use; so may they originally be infeoffed to an use; yet if it be before the Statute, and they had (upon a Subpœna brought) executed their Estate during the coverture or infancy

they might have defeated the ſame, and when they ſhould have beene ſeized againe to the Uſe, and not to their owne uſe, but ſince the Statute no right is ſaved unto them.

If a feme Covert or an Infant be enfeoffed to an Uſe precedent ſince the Statute, the Infant or Baron come too late to diſcharge or roote up the Feoffment; but if an Infant be infeoffed to the Uſe of himſelfe and his Heires, and *I. D.* pay ſuch a ſumme of money to the Uſe of *I. G.* and his Heires, the Infant may diſagree and overthrow the contingent Uſe.

Contrary Law if an Infant be infeoffed to the Uſe of himſelfe for life, the remainder to the Uſe of *I. S.* and his Heires, he may diſagree to the feoffment, as to his owne Eſtate, but not to deveſt the remainder, but it ſhall remaine to the benefit of him in remainder.

And yet if an Attainded perſon be infeoffed to an Uſe, the Kings Title after Office found, ſhall prevent the Uſe, and Relate above it but untill office the *Ceſty que vſe* is ſeiſed of the Land.

Like Law of an Alien, for if Land be given to an Alien to an Uſe, the Uſe is not voyd *ab initio*: Yet neither Alien or Attainded perſon can maintaine an Action to defend the Land.

The Kings Villeine if he be infeoffed to an Uſe, the Kings Title ſhall relate above the Uſe, otherwiſe in Caſe of a common perſon.

But if the Lord be infeoffed to the Uſe of his Villeine, the Uſe neither riſeth, but the Lord is in by the Cõmon Law, & not by the Statute diſcharged of the uſe.

But if the husband be infeoffed to the uſe of his wife for yeares, if he die, the wife ſhall have the Terme, and it ſhall not inure by way of diſcharge, although the Husband may diſpoſe of the wives Terme.

So if the Lord of whom the Land is held be infeoffed to the Uſe of a perſon Attainded, the Lord ſhall not hold by

by way of discharge of the Use, because of the Kings Title, *An. diem & vastum.*

A person uncertaine is not within the Statute, nor any Estate in *nutibus* or suspence executed, as if I give Land to *I. S.* the remainder to the right Heires of *I.D.* to the use of *I. N.* and his Heire, *I. N.* is not seised of the Fee-simple of an Estate *per vit.* of *I.S.* till *I.D.* be dead, and then in Fee-simple.

Liker Law if before the Statute, I give Land to *I. S. per autter vie* to an Use, and *I. S.* dyeth, leaving *Cesty que vse*, whereby the free-hold is in Suspence, the Statute commeth, and no occupant entreth; the Use is not executed out of the free-hold in suspence. For the occupant the Disseisor the Lord by Escheate: The Feoffee upon consideration, not having notice, and all other persons which shalbe seised to Use, not in regard of their persons but of their Title. I referre them to my division touching disturbance and interruption of Uses.

It followeth now to see what person may be a *Cesty que vse*, the King may be *Cesty que vse*; but it behoveth both the declaration of the Use and the conveyance it selfe, to be matter of Record, because the Kings Title is compounded of both, I say, not appearing of Record, but by conveyance of Record. And therefore if I covenant with *I.S.* to leavy a Fine to him to the Kings use, which I do accordingly: And this deed of Covenant be not inrol'd, and the Deed be found by office the use vesteth not, *Econverso* inrol'd. If I covenant with *I. S.* to infeoffe him to the Kings use, and the Deed be inrol'd and the feoffment also be found by office, the use vesteth.

But if I leavy a fine, or suffer a Recovery to the Kings use, and declare the use by Deede of Covenant Enrol'd, though the King be not party, yet it is good enough.

A Corporation may take an Use, & yet it is not material whether the feoffment or the Declaration be by deed; but I may infeoffee *I.S.* to the use of a Corporation and this use may be averred.

A

A Uſe to a perſon incertaine is not voyd in the firſt limitation, but executeth not till the perſon be in (*eſſe*,) ſo that this is poſitive, than an Uſe ſhall never be in Obeyance, as a Remainder may be, but ever in a perſon certaine upon the words of the Statute, and the Eſtate of the Feeoffees ſhall be in him or them which have the Uſe: The reaſon is, becauſe no confidence can be repoſed in a perſon unknowne and uncertaine; and therefore if I make a feoffment to the uſe of *I. S.* for life, and then to the uſe of the right Heires of *I. D.* the remainder is not in Obeyance, but the Reverſion is in the Feoffer, (*quonſque*.) So that upon the matter all perſons uncertaine in Uſe, are like conditions or limitations precedent.

Like Law if I Enfeoffee one to the uſe of *I. S.* for yeares, the remainder to the right Heires of *I. D.* This is not executed obeyance, and therefore not void.

Like Law, if I make a Feoffment to the uſe of my wife that ſhall be, or to ſuch perſons as I ſhall maintaine, though I limit no particular Eſtate at all; yet the uſe is good, and ſhall in the interim returne to the Feoffor.

Contrary Law, if I once limit the whole Fee-ſimple of the Uſe out of Land, and part thereof to a perſon incertaine, it ſhall never returne to the Feoffer by way of fraction of the Uſe; but looke how it ſhould have gone unto the Feoffer; if I begin with a contingent Uſe, ſo it ſhall go to the remainder; if I intaile a contingent Uſe, both Eſtates are alike ſubject to the contingent Vſe when it falleth; as when I make a Feoffment in Fee to the uſe of my wife for life, the remainder to my firſt begotten ſon; I having no Sonne at that time, the remainder to my brother and his heires if my wife dye before I have any ſon, the Vſe ſhall not be in me, but in my brother. And yet if I marry againe and have a Sonne, it ſhall deveſt from my brother, and be in my Sonne, which is the skipping they talke ſo much of.

So

So if I limit an Uſe joyntly to two perſons; not in (*Eſſe*) and the one commeth to bee in *eſſe*, hee ſhall take the intire Uſe, and yet if the other afterward come in *eſſe*, hee ſhall take joyntly with the former, as if I make a Feoffment to the uſe of my Wife that ſhall bee, and my firſt begotten Sonne for their Lives, and I marry my Wife taketh the whole Uſe, and if I afterwards have a Sonne, hee taketh joyntly with my Wife.

But yet where words of obeyance worke to an Eſtate, executed in courſe of Poſſeſſion, it ſhall doe the like in Uſe, as if I infeoffee *A.* to the uſe of *B.* for life, the remainder to *C.* for life, the remainder to the right Heires of *B.* this is a good remainder executed.

So if I enfeoffee *A.* to the uſe of his right Heires *A.* is in the Fee-ſimple, not by the Statute, but by the Common Law.

Now are wee to examine a ſpeciall point of the diſability of perſons as to take by the Statute, and that upon the words of the Statute, where divers perſons are ſeiſed to the uſe of other perſons, ſo that by the letter of the Statute, no uſe is conteyned, but where the Feoffor is one, and *Ceſty que uſe* is another.

Therefore it is to bee ſeene in what Caſes the ſame perſons ſhall be both ſeiſed to the uſe and *Ceſty a que uſe*, and yet in by the Statute, and in what Caſes they ſhall be diverſe perſons, and yet in by the Common Law, wherein I obſerve unto you three things: Firſt, that the letter is full in the point. Secondly, that it is ſtrongly urged by the Clauſe of joynt Eſtates following. Thirdly, that the whole ſcope of the Statute was to remit the Common Law, and never to intermeddle where the Common Law executed an Eſtate, therefore the Statute ought to bee expounded, that where the party ſeiſed to the uſe, and the *Ceſty que uſe* is one perſon,

ſon, hee never taketh by the Statute except there bee a direct impoſſibiltie or impertinency for the uſe, to take effect by the Common Law.

And if I give Land to *I. S.* to the uſe of himſelfe and his Heires, and if *I. D.* pay a ſumme of mony, then to the uſe of *I. D.* and his Heires, *I. S.* is in of an Eſtate for life, or for yeares, by way of abridgment of Eſtate in courſe of Poſſeſſion, and *I. D.* in of the Fee-ſimple by the Statute.

So if I bargaine and ſell my Land after ſeven yeares, the Inheritance of the Uſe onely paſſeth, and there remaines an Eſtate for yeares by a kind of ſubſtraction of the Inheritance or *occupyer* of my Eſtate, but meerely at the Common Law.

But if I enfeoffee *I. S.* to the uſe of himſelfe intayle, and then to the uſe of *I. D.* in Fee, or Covenant to ſtand ſeiſd to the uſe of my ſelfe in tayle, and to the uſe of my Wife in Fee, in both theſe Caſes the Eſtate tayle is executed by this Statute, becauſe an Eſtate tayle cannot be reoccupied out of a Fee-ſimple being a new Eſtate, and not like a particular Eſtate for life or yeares, which are but portions of the abſolute Fee, and therefore if I bargaine and ſell my Land to *I. S.* after my death without Iſſue, it doth not leave an Eſtate tayle in mee, nor veſteth any preſent Fee in the bargaines, but is an uſe expectant.

So if I enfeoffee *I. S.* to the uſe of *I. D.* for life, and then to the uſe of himſelfe and his Heires, he is in of the Fee-ſimple meerely in courſe of Poſſeſſion, and as of a Reverſion, and not of a remainder.

Contrary Law, if I enfeoffee *I. S.* to the uſe of *I. D.* for life, then to the uſe of himſelfe for life, the remainder to the uſe of *I. N.* in Fee, now the Law will not admit fraction of Eſtates, but *I. S.* is in with the reſt by the Statute.

So if I infeoffee *I. S.* to the uſe of himſelfe and a Stranger,

Stranger, they ſhall be both in by the Statute, becauſe they could not take joyntly taking by ſeverall Titles.

Like Law if I infeoffee a Biſhop and his Heires to the uſe of himſelfe, and his ſucceſſors, he is in by the Statute in the right of his Sea.

And as I cannot raiſe a preſent uſe to one out of his owne ſeiſin, ſo if I limit a contingent or future uſe to one being at the time of limitation not ſeis'd, but after becomie ſeiſed at the time of the execution of contingent uſe, there is the ſame reaſon and the ſame Law, and upon the ſame difference which I have put before.

As if I covenant with my Sonne, that after his Marriage I will ſtand ſeiſed of Land to the uſe of himſelfe and his Heires, and before Marriage I enfeoffee him to the uſe of himſelfe and his Heires, and then hee marryeth, hee is in by the Common Law, and not by the Statute, like Law of a bargaine and ſale.

But if I had let to him for life onely, then hee ſhould have beene in for life onely by the Common Law, and of the Fee-ſimple by Statute. Now let mee adviſe you of this, that it is not a matter of ſubtilty or conceipt to take the Law right, when a man commeth in by the Law in courſe of Poſſeſſion, and where hee commeth in by the Statute in courſe of Poſſeſſion, but it is materiall for the deciding of many Cauſes and Queſtions, as for Warranties, Actions, Conditions, Wayners, Suſpitions, and divers other Proviſoes.

For example, a mans Farmer committed waſt,

after he in the Reversion covenanteth to stand seis'd to the use of his Wife for life, and after to the use of himselfe and his Heires, his Wife dyes, if hee bee in his Fee untouch'd he shall punish the waste, if he be in by the Statute he shall not punish it.

So if I bee infeoffed with Warranty, and I covenant with my Sonne to stand seised to the use of my selfe for life, and after to him and his Heires; if I bee in by the Statute, it is cleare my Warranty is gone, but if I be in by the Common Law it is doubtfull.

So if I have an eigne Right, and be infeoffed to the use of *I. S.* for life, then to the use of my selfe for life, then to the use of *I. D.* in Fee, *I. S.* dyeth, if I be in by the Common Law, I cannot wayve my Estate having agreed to the Feoffment: but if I am in by the Statute, yet I am not remitted, because I come in by my owne Act, but I may wayve my Use, and bring an Action presently, for my Right is saved unto me by one of the savings in the Statute. Now on the other side it is to bee seene, where there is a seisin to the use of another person, and yet it is out of the Statute which is in speciall Cases upon the ground whereof ever *Cestuy que use* had remedy, for the Possession by course of Common Law, there the Statute never worketh, and therefore if a disseisin were committed to an Use, it is in him by the Common Law upon agreement, so if one enter as occupant to the Use of another, it is in him till disagreement.

So if a feme infeoffe a man (*Causa matrimonii prælocuti*) she hath remedy for the Land againe by course of the Law, and therefore in those speciall Cases the Statute worketh not, and yet the words of the Statute are generall, (where any person stands seised by force

of any Fine, Recovery, Feoffment, bargaine and sale, agreement or otherwise.) but yet the feme is to bee restrained for the reason aforesaid.

It remaineth to shew what persons may limit and declare an Use, wherein we must distinguish, for there are two kinds of Declarations of Uses, the one of a present Use upon the first conveyance, the other upon a power of revocation or new declaration, the latter of which I referre to the division of revocation, now for the former.

The King upon his Letters Pattents may declare an Use, though the Pattent it selfe implyeth an Use, if none be declared.

If the King gives Lands by his Letters to *I. S.* and his Heires to the use of *I. S.* for life, the King hath the Inheritance of the use by impliation of the Pattent, and no Office needeth for impliation out of matter of Record, amounteth ever to matter of Record.

If the Queene give Land to *I. S.* and his Heires to the use of all the Church-wardens of the Church of *Dale*, the Pattentee is seised to his owne use, upon that confidence or intent. but if a common person had given Land in that manner. the use had bin voyd by the Stat. of 23. *H.*8. and the use had returned to the feoffor & his heires, A Corporation may take an Use without deed as hath bin said before, but can limit no Use without Deed.

An Infant may limit an Use upon a Feoffment, Fine, or Recovery, and he cannot Countermand or avoyd the Use, except hee avoyd the conveyance, contrary if an Infant covenant in consideration of bloud or Marriage to stand seised to an Use, the Use is meerely voyd.

If

If an infant bargaine and ſell his Land for mony, for Commons, or Teaching, it is good with averment, if for mony otherwiſe, if it be proved it is avoydable, if for mony recited and not paid it is voyd, and yet in the caſe of a man of full age the recitall ſufficeth.

If Barron and feme be ſeiſed in the right of the feme, or by joynt Purchaſe during the Coverture, and they joyne in a Fine, the Barron cannot declare the Uſe for longer time then the Coverture, and the feme cannot declare alone, but the Uſe goeth according to the limitation of Law, unto the feme and her Heires, but they may both joyne in Declaration of the Uſe in Fee, and if they ſever, then it is good for ſo much of the Inheritance as they concurr'd in, for the Law avoucheth all one as if they joyn'd, as if the Baron declare an Vſe to *I. S.* and his Heires, and the Feme another to *I. D.* for life, and then to *I. S.* and his Heires, the Vſe is good to *I. S.* in Fee.

And if upon examination the Feme will declare the Vſe to the Judge, and her Husband agree not to it, it is voyd, and the Barons Vſe is onely good, the reſt of the Vſe goeth according to the limitation of Law.

FINIS.